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No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,
Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE
MANAGEMENT AUTHORITY, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the dormant Commerce Clause forbids a local government from requiring its citizens to have their trash hauled to facilities that the local government itself owns.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Because waste management poses a great challenge to state and local governments and their citizens, *amici* have a compelling interest in this case. The challenge is to devise waste management programs that comply with all local, state, and federal requirements; make efficient use of public funds and other public resources; and, most importantly, protect the safety and health of their citizens.

To meet this challenge, many States authorize local governments to enact flow control ordinances as one element of comprehensive waste management schemes. As explained in the official policy of *amicus* National Association of Counties, for example: "Flow control authority gives counties the option to protect themselves and their citizens from Superfund liability at older landfills which may not be environmentally protective, and to overcome the incentive to utilize cheaper, less environmentally-sound landfills. The option to exercise flow control authority also allows states and local governments to create and sustain in-state waste disposal capacity, thereby moderating some of the pressures to export waste to other states." National Association of Counties, "Environment, Energy & Land Use," in *The American County Platform and Resolutions* (2006) at p. 10, available at http://www.naco.org/ContentManagement/ContentDisplay.cfm?ContentID=21816.

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[1] Pursuant to this Court's Rule 37.3(a), the parties have consented to the filing of this brief and have filed letters of consent with the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Because of the importance to *amici* and their members of preserving the option to use flow control laws as an essential component of comprehensive waste management schemes such as that of respondents, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

We agree with respondents that the Second Circuit correctly analyzed and rejected petitioners' dormant Commerce Clause challenge to the flow control ordinances at issue here. Pet. App. 1a-21a (second panel opinion); *id.* at 22a-53a (first panel opinion). In this brief, we offer an alternate route to the same conclusion. Our approach reflects that respondent Oneida-Herkimer Solid Waste Management Authority (Authority) is acting as a market participant when it supplies integrated waste management services to the residents of Oneida and Herkimer Counties (Counties). *See, e.g., Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

1. The Authority acts as a market participant when it provides waste management services to the Counties' residents. This Court has defined market participation to include the government's sale of publicly produced services, which is what is happening here. The lower federal courts have correctly recognized that the government's operation of publicly owned waste management facilities constitutes market participation.

As a market participant, the Authority can favor the Counties' residents. The Authority does so by accepting at its waste management facilities only waste generated in the Counties. The question is whether, in addition to favoring its residents in the provision of the Authority's waste management services, the Counties can require them to have their waste hauled to the Authority's facilities.

2. That question is answered by a principle that emerges from this Court's market participant cases: Just as the dormant Commerce Clause allows the government to prefer its own citizens in the provision of publicly created benefits, it allows the government to impose on its citizens some concomitant burdens necessary to create and sustain those benefits. For example, the government may tax its citizens to fund "free" or below-market-priced goods and services, such as garbage collection. Although tax laws compelling citizens to fund the public services provided to them do not themselves constitute market participation, they make the government's market participation possible. They also mean that—even when acting as a market participant by providing publicly produced services—the government "has the attributes of both a political entity and a private business." *Reeves, Inc. v.* Stake, 447 U.S. 429, 439 n.12 (1980). These tax laws do not violate the Commerce Clause. Rather, they advance "the essential and patently unobjectionable purpose of state [and local] government—to serve the citizens." *Id.* at 442.

3. The same is true of the flow control ordinances challenged here. They fall within the type of regulatory burdens that a government can impose on its citizens to support and sustain the public services provided to them. As petitioners concede (Pet. Br. 48) and lower courts have held, a local government could "eliminate" the market for waste management services by becoming the exclusive provider of cradle-to-grave waste management services to all its citizens. Such a public monopoly, the financial burden and risk of which is borne by citizen-taxpayers, does not discriminate against interstate commerce or unduly burden it. Nor do the Counties' flow control ordinances.

Like a public monopoly, the flow control ordinances do not discriminate against interstate commerce. Rather, they simply reflect the government favoring itself. Moreover, the challenged ordinances do not unduly burden interstate com-

merce. Indeed, unlike a public monopoly in which the government is the exclusive provider of cradle-to-grave waste management services, the flow control ordinances challenged here do not eliminate the private market. The ordinances thus displace private commercial activity less than would a concededly valid scheme in which the government alone provides the complete range of services.

4. Petitioners' market participant argument does not fit the facts of this case and misreads this Court's market participant decisions. Petitioners argue that a state or local government cannot use its regulatory power to favor its market participation over private competitors. The argument may have some force where regulatory measures support governmental activity that merely mimics private commercial activity and is conducted solely for profit. The argument has no force here, however, because respondents' provision of waste management services advances governmental objectives through means that are rare or nonexistent in the private sector precisely because they are not conducted for profit. Furthermore, this Court's market participant decisions do not support petitioners' contention that a state or local government can never use regulatory power to support its market participation.

ARGUMENT

THE DORMANT COMMERCE CLAUSE DOES NOT FORBID A LOCAL GOVERNMENT FROM REQUIRING ITS CITIZENS TO HAVE THEIR TRASH HAULED TO A FACILITY THAT THE LOCAL GOVERNMENT ITSELF OWNS

As explained in their merits brief, respondents have developed a comprehensive waste management program for the Counties' residents. Under the program the Authority acts as a market participant by selling integrated waste management services to the Counties' residents. The challenged flow

control ordinances are an essential part of that program. Pet. App. 20a; Resp. Br. 1-8.

Analysis of the ordinances is therefore appropriately guided by decisions of this Court recognizing a "market participant exception" to the dormant Commerce Clause. *E.g.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999) (using this term); *see, e.g.*, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Those decisions demonstrate that, just as local governments can give some preference to their residents in the provision of public services, they can impose some concomitant burdens necessary to support the provision of those services. Those burdens can include, but are not limited to, tax laws compelling citizens to fund the public services that a local government provides them. Like such tax laws, the Counties' flow control ordinances neither discriminate against nor unduly burden interstate commerce.

I. A Local Government Acts As A Market Participant When It Sells Waste Management Services To Its Citizens

When a State or local government buys or sells goods or services like a private market actor, its activities are "difficult to assess under traditional Commerce Clause analysis." *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980). This Court has accordingly developed a distinct, "market participant" doctrine for assessing those activities. *See, e.g.*, *College Sav. Bank*, 527 U.S. at 685. The market participant doctrine provides guidance here, because the challenged flow control ordinances are an essential part of a comprehensive program at the center of which is market participation by a local government entity, the Oneida-Herkimer Solid Waste Management Authority.

The Authority acts as a market participant by providing the Counties' residents with comprehensive waste management services at Authority-owned facilities. To support those services, the Authority charges $78 per ton of non-recyclable material to those who haul the material to its facilities. Private haulers, in turn, pass on that cost to the waste generators. Resp. Br. 7. The Authority's charge for non-recyclable waste supports a range of waste management services. For example, the Authority accepts residential recyclables and household hazardous waste at "[n]o charge." J.A. 283a-284a. Thus, the Authority is in effect selling comprehensive waste management services to its citizens.

This activity closely resembles the activity at issue in *Reeves v. Stake*. *Reeves* involved South Dakota's sale of cement produced by a state-owned cement plant. *See* 447 U.S. at 431-433. The Court held that "South Dakota, as a seller of cement, unquestionably fits the 'market participant' label * * *." *Id.* at 440. The Court observed that, unlike natural resources, cement "is the end product of a complex process whereby a costly physical plant and human labor act on raw materials." *Id.* at 444. So, too, are the Authority's waste management services, the sale of which "unquestionably fits the 'market participant' label." *Id.* at 440.[2]

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[2] By the same token, the Authority's activity differs from governmental activity that the Court has found not to constitute market participation. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 592-594 (1997) (tax exemption); *New Energy Co. v. Limbach*, 486 U.S. 269, 277-278 (1988) (tax credit); *Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 106 n.9 (1994) ("[W]e confront a patently discriminatory law that is plainly connected to the regulation of interstate commerce. We therefore have no occasion to decide whether Oregon could validly accomplish its limited cost spreading through the 'market participant' doctrine," said of surcharge imposed on in-state disposal of waste generated out of state that was higher than fee for disposal of waste generated inside the state).

The Authority acts as a market participant even though the objectives underlying respondents' waste management program differ from those of private market participants. Most importantly, neither the Authority nor the Counties are in this for the money. They are in this to protect the health and safety of the Counties' residents. *See* Resp. Br. 1. These objectives distinguish them from private market participants. At the same time, they align them with Maryland, whose subsidy program constituted market participation designed to "us[e] its limited funds to clean up its own environment," *Alexandria Scrap*, 426 U.S. at 814; and with South Dakota, whose preference for citizens in the sale of cement served the "governmental goal" of "generating a supply of a previously scarce product needed for local construction and governmental improvements," *Reeves*, 447 U.S. at 442 n.16; *see also United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 222 (1984) (discussing justifications asserted for city's hiring preference for city residents).

This Court's decisions upholding Maryland's and South Dakota's programs show that the Authority's uniquely governmental objectives do not alter its status as a market participant. To the contrary, the restraint underlying the Court's use of the dormant Commerce Clause to invalidate market participation by state and local governments is based partly on "considerations of state sovereignty [and] the role of each State '"as guardian and trustee for its people"' * * *." *Reeves*, 447 U.S. at 438 (quoting *Heim v. McCall*, 239 U.S. 175, 191 (1915) (quoting *Atkin v. Kansas*, 191 U.S. 207, 222 (1903)) (footnote omitted).

Likewise, the Authority's provision of waste management services qualifies as market participation even though the Authority does things that private waste management companies do not do. As respondents' brief describes, for example, the waste management program includes methods and incentives to reduce waste and to divert maximum

quantities of waste to recycling. Resp. Br. 37-39. Those actions do not enhance the bottom line and are not meant to do so. Indeed, some of the waste management services that are provided by the Authority's facilities yield no revenues, but they generate public benefits. J.A. 376a-377a.

In short, respondents do not behave exactly like private market participants. But neither did Maryland when it paid scrap processors bounties to process abandoned cars titled in Maryland simply to clean up Maryland roadsides. Neither did South Dakota when it sold its cement, not for the highest price that the market would bear, but to its own citizens in preference to others. This Court's decisions recognize that state and local governments may use market participation as a means of creatively addressing their citizens' needs. *See Reeves*, 447 U.S. at 441.

Of particular relevance, this Court has recognized that the market participant doctrine may apply when publicly owned facilities provide waste management services. *Oregon Waste Sys.*, 511 U.S. at 106 n.9 ("We * * * have no occasion to decide whether Oregon could validly accomplish its limited cost spreading through the 'market participant' doctrine."); *see also Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting) ("Alabama may, under the market participant doctrine, open its own facility catering only to Alabama customers."); *cf. City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 n.6 (1978) (noting in waste case, "We express no opinion about New Jersey's power, consistent with the Commerce Clause, * * * to spend state funds solely on behalf of state residents and businesses") (citing *Alexandria Scrap*, 426 U.S. at 805-810). Accordingly, the lower federal courts have held that a state or local government's provision of waste management services produced by publicly owned facilities constitutes "market

participation."[3] The market participant doctrine is likewise relevant in this case.

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[3] *Incorporated Village of Rockville Centre v. Town of Hempstead*, 196 F.3d 395, 398-402 (2d Cir. 1999) (town acted as market participant when it entered into and later sought to enforce agreement with villages requiring them to dispose of all their trash at the town's waste management facility, in return for town's agreement to supply villages' disposal needs for twenty years); *Automated Salvage Transp., Inc. v. Wheelabrator Envntl. Sys., Inc.*, 155 F.3d 59, 78-79 (2d Cir. 1998) (state agency acted as market participant by entering into long-term waste disposal contracts with Connecticut municipalities as vendor of waste disposal services provided by agency-owned and operated facilities and in reaching settlement agreement with private haulers to prevent interference with those contracts); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1288-1292 (2d Cir. 1995) (town acted as market participant when it hired contractor to pick up town's trash and deliver it to publicly owned facility), *cert. denied*, 517 U.S. 1135, 1150 (1996); *Swin Res. Sys., Inc. v. Lycoming County*, 883 F.2d 245, 248-251 (3rd Cir. 1989) (relying on Court's market participant cases to hold that county did not violate dormant Commerce Clause by charging, at county-operated landfill located on site leased from federal government, a higher disposal fee for waste generated outside the local area than for locally generated waste), *cert. denied*, 493 U.S. 1077 (1990); *see also National Solid Waste Mgmt. Ass'n v. Williams*, 146 F.3d 595, 599-600 (8th Cir.) (State acted as market participant in directing local governmental units' purchase of waste management services), *cert. denied*, 525 U.S. 1012 (1998); *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 51, 55-56 (2d Cir.) (town acted as market participant when it contracted with private firm to be the exclusive collector of town's waste and to transport it to publicly owned waste management facility), *cert. denied*, 525 U.S. 923 (1998); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514-518 (2d Cir. 1995) (town acted as market participant when it bought trash collection and disposal services from one private contractor and, under terms of contract, required trash to be delivered to facility operated by a second contractor), *cert. denied*, 516 U.S. 1112 (1996); *cf. Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-16 (6th Cir. 2000) (holding that market participant doctrine did not apply because "[t]he County was not * * * 'selling' its own processing services" but was instead "effectively forcing all city residents to purchase the processing services directly from [a private franchisee]"); *GSW, Inc. v. Long County*, 999 F.2d 1508, 1511-1516 (11th Cir. 1993) (county did not

Under the doctrine, the Authority may favor the Counties' residents in providing waste management services. *See Camps Newfound/Owatonna*, 520 U.S. at 592-593 ("[A] State acting in its proprietary capacity as a purchaser or seller may 'favor its own citizens over others.'") (quoting *Alexandria Scrap*, 426 U.S. at 810). That happens here. The Authority's facilities do not accept waste (other than recyclables) generated outside the Counties. Pet. App. 25a; *see* N.Y. Pub. Auth. L. § 2049-ee(4) & (7) (McKinney 1995). The question is whether, in addition to favoring its citizens through the provision of waste management services provided by the Authority, the Counties can require their residents to have their waste hauled to the Authority's facilities. This Court's market participant decisions answer "yes" to that question, as discussed below.

II. A Local Government May, Consistent With The Dormant Commerce Clause, Impose On Its Residents Regulatory Burdens That Are Essential To Providing Public Services Through Market Participation

When acting as a market participant, a local government can favor its own residents in providing services produced by publicly owned facilities. Such favoritism does not impermissibly discriminate against interstate commerce or unduly burden it. Moreover, just as the Commerce Clause allows a local government to favor its residents in providing

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act as market participant when it sought contractually to obligate company to build landfill and accept only waste within 150-mile radius of that site); *but cf. U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067-1072 (8th Cir. 2000) (striking down as violative of dormant Commerce Clause a city ordinance requiring waste collected in city that was destined for in-state disposal to be delivered to city-owned transfer station; no discussion of market participant exception).

publicly produced services, the Commerce Clause allows the local government to impose on its residents some concomitant burdens to support those services. This principle emerges from the Court's market participant cases.

In *Reeves*, the Court likened market participation by the government that favors citizens to the government's preferential provision of public services such as police and fire protection. *See Reeves*, 447 U.S. at 442 (South Dakota's preference for citizens in the sale of cement was no more "protectionist" than "rules restricting to state residents the enjoyment of * * * [among other services] police and fire protection"); *see also Swin Resource Sys.*, 883 F.2d at 251 n.2 (likening county's local preference in operating its landfill to public school's treating nonresident students differently from resident students).

In each situation, the government is channeling to its citizens benefits that they support through taxes and otherwise. *Reeves*, 447 U.S. at 442 (South Dakota's preference "is 'protectionist' only in the sense that it limits benefits generated by a state program to those who fund the state treasury"); *cf. Alexandria Scrap*, 426 U.S. at 814 (rejecting Equal Protection Clause challenge to preferential provision in Maryland bounty program, holding that it bore a rational relationship "to Maryland's purpose of using its limited funds to clean up its own environment"). In each situation, too, the government's provision of services—whether they be traditional services such as fire and police protection or services usually provided by private market actors—may prevent the services from being provided through the private market.

This government displacement of private market activity occurs whether the government-provided services are paid for through taxes or separate charges. For example, a city may provide residential garbage collection to its citizens. Citizens may pay the city for those garbage collection services through

taxes or by paying periodic bills based on their usage of the services (like a water bill). This is true, furthermore, whether the city's collection of trash is considered a traditional government function or an entry by the government into a market ordinarily served by private actors. *Cf. Reeves*, 447 U.S. at 442 n.16 ("[a] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise") (quoting *New York v. United States*, 326 U.S. 572, 591 (1946) (Douglas, J., dissenting)). In either event, citizens are steering dollars to the government that might otherwise go to private companies, including out-of-state companies. *See Town of Babylon*, 66 F.3d at 1291-1292 (upholding against Commerce Clause challenge property taxes and user fees that financed town's provision of waste management services through market participation).

Citizens pay taxes under compulsion, of course. The laws exerting that compulsion do not themselves constitute market participation when viewed in isolation. They make the government's provision of services possible, however, and therefore cannot be considered in isolation from that provision of services. The broader point is that, when the government "limits benefits generated by a state program to those who fund the state treasury," *Reeves*, 447 U.S. at 442, that funding may occur through taxes or regulatory measures. Just as the Commerce Clause does not forbid the government from limiting some benefits to its citizens, the Clause does not forbid some measures necessary to support the provision of those benefits.

For example, South Dakota spent $2 million to build its cement plant. *Reeves*, 447 U.S. at 446 n.19. The risk of that investment was "borne by South Dakota taxpayers." *Id.* The taxpayers presumably paid those taxes under compulsion, but the tax laws supporting the plant would not violate the Commerce Clause any more than did the State's policy preferring its citizens in the sale of the cement plant's production.

Similarly, the "limited resources" that Maryland used for the bounty program upheld in *Alexandria Scrap* came from fees that the State charged for issuing certificates of vehicle titles. *See* Brief of Appellees at p. 24 & n.38, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (No. 74-1607); *see also Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46, 63 (D. Md. 1975), *rev'd*, 426 U.S. 794 (1976) (observing that bounty program was supported by "state funds"). Thus the bounty program was supported by regulatory fees that anyone who wanted a certificate of title in Maryland was compelled to pay. The laws imposing those fees did not violate the dormant Commerce Clause any more than did the bounty program itself.

More fundamentally, the fact that the programs upheld in *Reeves* and *Alexandria Scrap* were supported by funds from taxes and regulatory fees did not disqualify South Dakota or Maryland for market participant status. Rather, the use of state funds to support the programs—like the governmental objectives underlying the programs—merely reflect that, even when the government acts as a market participant, it "has the attributes of both a political entity and a private business." *Reeves*, 447 U.S. at 439 n.12. Both the bounty program and state legislation supporting it advanced "the essential and patently unobjectionable purpose of state [and local] government—to serve the citizens." *Reeves*, 447 U.S. at 442; *see Alexandria Scrap*, 391 F. Supp. at 48-54 (describing legislation).

Regulatory burdens besides taxes and fees may, consistently with the Commerce Clause, support the government's provision of services to its citizens. The bounty program upheld in *Alexandria Scrap* effectively regulated transactions between unlicensed suppliers of auto "hulks" and licensed processors of those hulks. *See Alexandria Scrap*, 426 U.S. at 802 (bounty program "gave Maryland processors an advantage over appellee and other non-Maryland processors in the

competition for bounty-eligible hulks from unlicensed processors"). In addition, recipients of the bounty had to comply with a licensing scheme. *See id.* at 799-800 & n.9; *Alexandria Scrap*, 391 F. Supp. at 49-50.

In *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 205-206 & n.1, 209-211 (1983), the Court upheld against Commerce Clause challenge an executive order requiring work forces on city-funded construction projects to consist of at least fifty percent city residents. The Court recognized that the order effectively regulated employment contracts between public contractors and their employees. *See id.* at 211 n.7 (noting, in response to dissent's argument that the order "goes beyond market participation because it regulates employment contracts between public contractors and their employees," that "the mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant" because "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city'").

The principle that emerges from these decisions is that, just as the Commerce Clause allows a State or local government to prefer its citizens in the provision of services, it allows the government to impose some concomitant regulatory burdens necessary to support those services. True, the Commerce Clause puts some limits on both the benefits and the concomitant burdens. *See Camps Newfound/Owatonna*, 520 U.S. at 594 ("Maine's tax exemption—which sweeps to cover broad swathes of the nonprofit sector—must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function."); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93-99 (1984) (opinion of White, J.) (holding that Alaska statute requiring in-state processing of timber sold by the State did not fall within market participant doctrine); *White*, 460 U.S. at 211

n.7 ("[T]here are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business."). As discussed below, however, the ordinances challenged here fall within those limits.

III. Flow Control Ordinances Fall Within The Regulatory Burdens That A Local Government Can, Consistent With The Dormant Commerce Clause, Impose On Its Citizens As An Integral Part Of A Program For Providing Them With Waste Management Services Produced By Publicly Owned Facilities

Above we established that a local government may not only prefer its residents in providing public services but also impose on them some concomitant regulatory burdens. The question remains whether the particular regulatory burden at issue here—contained in the Counties' flow control ordinances—falls within the scope of regulatory burdens that the Counties can impose as a concomitant of providing waste management services at publicly owned facilities.

The answer is yes. These ordinances are no more discriminatory against interstate commerce (which is to say that they are not at all discriminatory) and no more burdensome (which is to say that they impose no cognizable burden) upon interstate commerce than a tax-supported, cradle-to-grave program of publicly provided waste management services. As petitioners concede, the latter would not violate the dormant Commerce Clause.

Petitioners readily acknowledge that "a municipal government may provide comprehensive waste management services to its citizens as a public service without violating the Commerce Clause." Pet. Br. 48; Pet. App. 6a ("[Petitioners] conceded at oral argument that the Counties could create a

public monopoly encompassing the entire waste management process, thereby displacing private firms altogether, without violating the Commerce Clause.").[4] Petitioners cannot dispute that a local government could support the provision of such a cradle-to-grave waste management program through taxation. *See Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments * * *."); *see also Reeves*, 447 U.S. at 442 (State may "limit[] benefits generated by a state program to those who fund the state treasury and whom the State was created to serve").

In operating such a tax-supported public monopoly, the government could provide the services to its citizens "for free" or for a below-market-rate charge. Citizens would use those services instead of ones provided by private market participants. In a sense, the government would thereby "eliminate" the market for waste management services. *See, e.g., Town of Babylon*, 66 F.3d at 1283. In any event, the government would displace private commerce, including interstate commerce.

As stated, petitioners concede that such a program would comport with the dormant Commerce Clause, and lower court case law confirms this. *See, e.g., Southern Waste Sys., Inc. v. City of Delray Beach*, 420 F.3d 1288, 1291 (11th Cir. 2005) (upholding city ordinance and contract awarding exclusive right to private firm to provide waste collection services to its residents, stating, "The Commerce Clause * * * does not forbid exclusive franchise agreements whereby a city selects

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[4] *See also* Transcript of Oral Argument, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (No. 92-1402), 1993 U.S. Trans LEXIS 116, at *7 (counsel for petitioners seemingly answering yes to Chief Justice's question whether "individual municipalities can operate monopoly trash disposal" without violating Commerce Clause).

one waste hauler to provide basic waste collection services to its citizens, so long as the bidding process is open to all, and there is no requirement that local interests be favored in the performance of the contract."); *Town of Babylon*, 66 F.3d at 1282-1288 (rejecting Commerce Clause challenge to "the Town's decision to replace the private market for commercial garbage collection with uniform municipal collection"). Yet petitioners cannot identify any way in which the actual waste management program that respondents have developed—of which the challenged flow control ordinances are an essential part, *see* Pet. App. 20a—is any more discriminatory against or burdensome to interstate commerce than a tax-supported, public program of "free" cradle-to-grave waste management services.

Indeed, whether the government displaces private commerce through tax-supported or fee-supported provision of services, it is just as effectively preventing the services from being provided through the private market. In either case, the government is not discriminating against interstate commerce but instead is simply favoring itself as a supplier of services over the private market. *See Sal Tinnerello*, 141 F.3d at 56 (town did not discriminate against interstate commerce by requiring that waste generators "buy collection or disposal services solely from the Town"); *cf. Town of Babylon*, 66 F.3d at 1283-1286. In either case the government favors itself to fulfill "the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." *Reeves*, 447 U.S. at 442. Accordingly, a local government's decision whether to finance its provision of services by compulsory taxes or by requiring citizens to use (and pay for) those services is not a decision that the Commerce Clause constrains.

The ordinances challenged here are part of a waste management program that displaces private commercial activity less than would a concededly valid scheme in which the

government alone provides cradle-to-grave services. Respondents provide disposal and recycling services. Waste collection is provided by cities, towns, and villages in the two-county region and by private waste haulers such as petitioners. Resp. Br. 2. Private hauling could be replaced by a public system, in which all garbage generated in the counties would be collected by public employees driving publicly owned garbage trucks to haul that garbage to the publicly owned waste management facilities.

Given petitioners' acknowledgement that such a public monopoly would be valid, it is hard to see how a Commerce Clause violation can arise when private firms furnish one segment of the waste service. A local government need not monopolize the whole waste stream to stay within Commerce Clause bounds. *Cf. Reeves*, 447 U.S. at 445 (rejecting argument against South Dakota policy preferring citizens in sale of state-produced cement because the argument "would tolerate even a greater measure of protectionism and stifling of interstate commerce than the challenged system allows").

Our point is that neither the purpose nor effect of respondents' program on interstate commerce can be distinguished from a plainly permissible program of "free," tax-supported waste management services provided by publicly owned facilities. Thus, we do not argue that the flow control ordinances "may be upheld against Commerce Clause challenge on the ground that the State could achieve the same end as a market participant." *Wunnicke*, 467 U.S. at 98-99 (plurality opinion). To the contrary, we recognize that the dormant Commerce Clause could bar some regulatory measures that required a state or local government's citizens to use publicly provided goods or services rather than those available through the private market.

For example, we doubt that a State could require its citizens to buy cement produced by the state-owned cement plant. *Cf.* Pet. Br. 35. Such a requirement would not

discriminate against interstate commerce, because it would merely reflect the State's desire to favor itself. Still, the requirement would impose burdens on interstate commerce that would be undue in light of its local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The requirement thus could violate the Commerce Clause even though a municipality can validly provide its citizens with free cement produced at publicly owned facilities with local tax dollars.

On the other hand, some such requirements could have such significant local benefits that they would withstand Commerce Clause challenge despite their effect on interstate commerce. For example, a local government might have compelling reasons for requiring its citizens to buy vaccinations from the local health department instead of from private health care providers. Such reasons could include ensuring the quality of the vaccines, the consistency of their administration, and the completeness and accuracy of record keeping.

The Commerce Clause allows the government to favor its citizens in providing vaccine services, which generate public benefits as well as individual benefits, and the Commerce Clause also allows the government to impose some concomitant regulatory burdens necessary to providing those services. The same is true of the comprehensive waste management services provided by respondents, and the flow control ordinances necessary to support those services.

IV. Petitioners' Market Participant Argument Does Not Fit The Facts Of This Case And Misreads This Court's Market Participant Decisions

Petitioners argue (Pet. Br. 34) that a state or local government cannot use its regulatory power to favor its market participation over private competitors. The argument may

have some force where regulatory measures support governmental activity that merely mimics private commercial activity and is conducted solely for profit. The argument has no force here, however, because respondents' provision of waste management services advances governmental objectives through means that are rare or nonexistent in the private sector precisely because they are not designed to turn a profit. *See* Resp. Br. 6-8, 37-39. Furthermore, this Court's market participant decisions do not support petitioners' contention that a state or local government can never use regulatory power to support its market participation.

The challenged flow control ordinances are not designed to support governmental activity that merely replicates that of private market actors or to turn a profit. To the contrary, respondents' waste management program is designed to advance the uniquely governmental objectives of protecting the health and safety of the Counties' residents and minimizing the amount of waste disposed of in landfills. Resp. Br. 1, 6. The program achieves these objectives through incentives and waste management methods that—precisely because they further distinctly governmental objectives—are difficult or impossible to obtain in the private market. *Id.* at 38-40.

Thus, respondents, like the governmental actors in *Alexandria Scrap*, *Reeves*, and *White*, participate in the market to achieve governmental objectives—rather than entrepreneurial ones—and accordingly behave in ways (e.g., preferring their citizens) that private market actors do not.

Indeed, the government may enter the market precisely because the existing private participants are not adequately serving its citizens' needs. For example, "the very reason" South Dakota built its own cement plant "was because the free market had failed adequately to supply the region with cement." *Reeves*, 447 U.S. at 445-446. Maryland entered the market for auto hulks because the private market left too

many abandoned vehicles on Maryland roadsides. *See Alexandria Scrap*, 426 U.S. at 796-797 (describing "bottle-necks in the 'scrap cycle'").

So, too, here, the Counties developed a comprehensive waste management plan, including publicly-owned facilities supported by flow control, because the private market was not working. Among other problems, reliance on the private market exposed local businesses to massive litigation and costs associated with clean-up and remediation under state and federal laws. Resp. Br. 3-4.

In entering the market, the government does not entirely leave behind its governmental identity. *See Reeves*, 447 U.S. at 439 n.12. Not only may the government participate in the market to achieve governmental objectives, as discussed above at pp. 12-15, it may use some regulatory means to support its market participation.

Petitioners' contrary argument misreads this Court's case law. For example, petitioners quote in isolation the statement in *Reeves* that South Dakota had not "restricted the ability of private firms or sister States to set up plants within its borders." 447 U.S. at 444 (quoted in Pet. Br. 34). This language, however, was part of the Court's broader point that South Dakota was not restricting access to the natural resources of which cement is made. *See Reeves*, 447 U.S. at 444. In this way, the Court distinguished *Reeves* from cases in which States sought to hoard their natural resources. *See id.* at 443-444. The Court was not addressing the government's use of regulatory power to facilitate its market participation. Furthermore, similar to South Dakota in *Reeves*, respondents do not restrict the ability of private waste management firms to locate within their borders. Thus, *Reeves* does not support petitioners' argument.

Petitioners' reliance on *Wunnicke* (Pet. Br. 35) is likewise misplaced. *Wunnicke* did not address the government's use of regulatory power to support its market participation. In

Wunnicke, the Court held that Congress had not authorized Alaska's requirement that the purchasers of its timber have the timber processed in Alaska. *See* 467 U.S. at 84-85 & n.2. A plurality of the Court also determined that the requirement could not be upheld under the market participant doctrine. *See id.* at 93-99 (plurality opinion).

In its market participant analysis, the *Wunnicke* plurality did not treat the in-state processing requirement as a regulation but as essentially a contractual condition that Alaska, as the seller of the timber, imposed on those who bought it. *See* 467 U.S. at 97 (plurality opinion) ("[T]he [market participant] doctrine * * * does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity.") The plurality faulted the condition's "substantial regulatory *effect*." *Id.* at 97 (emphasis added). Thus, the *Wunnicke* plurality opinion did not analyze the use of regulation in conjunction with market participation; rather, it addressed the use of market participation to achieve a regulatory result. For that reason, it, like *Reeves*, does not support petitioners' argument.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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